In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 364

ROBERT FROEHLICH AND ROBERT FROEHLICH FUNDING COMPANY, PETITIONERS

v.

THE DISTRICT JUDGES CONSTITUTING THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND ROBERT M. MORGANTHAU, AS UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On August 3, 1964, in the United States District Court for the Southern District of New York, a 32 count indictment was filed charging petitioners with making false statements to a federal savings and loan association for the purpose of influencing

its action with respect to mortgage loans, in violation of 18 U.S.C. 1014 and 2. The counts were in three distinct groups, each group preceded by general allegations applicable to each count thereunder. There was set forth in tabular form the date and the false statement of 13 loan applications (Counts 1-13), 12 contracts of sale (Counts 14-25) and 7 credit reports (Counts 26-32)—all submitted to the association in connection with specified mortgages (see Pet. App. B).

On August 28, 1964, the corporate petitioner moved to dismiss the indictment as vague and indefinite, and in the alternative for a bill of particulars. On October 27, 1964, Judge Murphy denied the motion for dismissal, holding that the indictment, though in some respects cryptic, conformed with the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure in that it alleged the elements of the offense, apprised the defendant of what it must be prepared to meet, and constituted a record showing with accuracy to what extent it would sustain a plea of former jeopardy. He declined to consider the motion with respect to the individual petitioner, who was a fugitive at the time (Pet. App. C).[1]

On October 26, 1964, the individual petitioner moved to dismiss the indictment. On February 5, 1965, Judge Wyatt denied the motion noting that

---

[1] Judge Murphy granted a motion for a bill of particulars to the extent that the government was required to show in what manner the action of the association was sought to be influenced. Particulars were furnished in March 1965 (Pet. Apps. E and F).

the indictment could be understood, was not ambiguous, and informed the defendant of the offenses charged (Pet. App. D).

On April 30, 1965, petitioners filed in the court of appeals an application for a writ of prohibition directed against the district judges and the United States Attorney, asking that the respondents be restrained from proceeding to trial upon the allegedly defective indictment. The court of appeals denied the application on May 17, 1965, and denied a petition for rehearing on June 10, 1965.

The question petitioners present, in seeking review in this Court, is not in this case. The government has never contended that the court of appeals lacked power, in an appropriate case, to issue a writ of prohibition. Moreover petitioners' representation that the court below denied their application for a writ "solely upon the ground that it did not possess jurisdiction" to hear such application is without basis in fact (Pet. 6; see Pet. App. A). Petitioners moved the court to amend its simple order of denial of May 17, 1965 (Pet. App. A), to read "Denied, solely on the ground that this Court lacks jurisdiction to grant such an application for a Writ of Prohibition" (R. 58). The court denied the petition for rehearing without amending its order (R. 75-77).

In the court below, the government argued that there were no extraordinary circumstances in this case warranting pre-trial review of the validity of the indictment by writ of prohibition, and that in any event the indictment, upheld by two district

judges, was valid.[2] There was no reason for the court of appeals to consider the validity of the indictment before judgment. Petitioners concede that the denial of a motion to dismiss an indictment is not appealable before trial. See *United States* v. *Golden*, 239 F.2d 877 (C.A. 2); *Snodgrass* v. *United States*, 326 F.2d 409 (C.A. 8); *Chereton* v. *United States*, 256 F.2d 576 (C.A. 6); *Atlantic Fishermen's Union* v. *United States*, 195 F.2d 1021 (C.A. 1). See also *Di Bella* v. *United States*, 369 U.S. 121, for the general rule that interlocutory appeals do not lie in criminal cases.[3] The claim of irreparable hardship because of the estimated duration of trial (an estimate in which we do not concur) deserves little comment in view of the delay already occasioned by the status of the individual defendant as a fugitive. Moreover this claim, and the claim that there are social and economic penalties which may not be recouped even if the indictment is held invalid on appeal, are best answered by this Court's language in *Cobbledick* v. *United States*, 309 U.S. 323 at 325:

---

[2] Similar indictments in which there is a reference of essential general allegations to tables listing specific counts have been upheld in many cases. See, *e.g.*, *United States* v. *Ketchum*, 320 F.2d 3 (C.A. 2), certiorari denied, 375 U.S. 905.

[3] None of the cases upon which petitioners rely involved claims relative to the invalidity of an indictment. See, *e.g.*, *Hartley Pen Co.* v. *U. S. District Court*, 287 F.2d 324 (C.A. 9) (involving an order of the district court to disclose trade secrets in private litigation); *Gladstein* v. *McLaughlin*, 230 F.2d 762 (CA. 9), and *Berger* v. *United States*, 255 U.S. 22 (involving allegations that trial would not be before an impartial tribunal).

"Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

AUGUST 1965

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 O - 783929 110